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No. 785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ARCO AUTO CARRIERS, INC., ET AL.,
Appellants,
vs.
STATE OF ARKANSAS, EX REL. BRUCE BENNETT,
Attorney General,
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OPPOSING REPLY TO JURISDICTIONAL STATEMENT

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Appellants file this pleading pursuant to Supreme Court Rule 16(3) in response to Appellee's Reply to Appellants' Jurisdictional Statement in which Appellee seeks to negate Appellants' contention that there is here involved a substantial federal question of first impression requiring resolution and determination by this Honorable Court.

At issue is the constitutionality of an Arkansas statute (Ark. Stat., 1947, Secs. 84-601-615) imposing an *ad valorem*

tax upon property in transit moving into, through and out of Arkansas as a necessary incident to the performance of interstate transportation services by non-resident motor carriers under the authority and requirement of certificates of public convenience and necessity issued by the Interstate Commerce Commission and performed exclusively in interstate commerce while in Arkansas.

In the State Court proceeding and in this Court Appellants have contended (See Jurisdictional Statement and appended Arkansas Supreme Court certificate, Appendix B, page a-7) that the Arkansas statute violates the Commerce Clause and the Due Process Clause of the United States Constitution (Article 1, Sec. 8, Clause 3 and Section 1 of Amendment Fourteen, respectively). Appellee contends in reply that this issue has been resolved adversely to Appellants' contention by this Court in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co. v. Peck*, 342 U. S. 382; and *Braniff Airways v. Nebraska*, 347 U. S. 590.

Appellee apparently reasons that if *ad valorem* taxes constitutionally may be levied upon the facilities of interstate rail, water and air carriers, the same legal concept may be extended automatically to interstate motor carriers by analogy and irrespective of the facts of record.

The State Court record here establishes that the motor carrier facilities so taxed have no permanent situs in Arkansas, are in all instances in transit while in Arkansas, move exclusively in interstate commerce, move with no regularity, over unspecified routes, move sporadically on call and demand, rather than on schedule, and are in the

possession of the taxed Appellants on an ownership basis in some instances, but in other instances are in the possession of the carrier under lease or under mere bailment (as in the instance of motor vehicles moving under their own power in driveaway service from consignor to consignee). These record facts are undisputed, but Appellee contends that these facts fail to distinguish the case at bar from those above cited and relied upon by Appellee.

The State Court record reveals no clear relationship between the involved tax and the use by the taxed Appellants of Arkansas highway facilities, the tax being levied for general purposes and not specifically for the construction, maintenance or policing of Arkansas highways. For the latter purposes Appellants are subjected to tax exactions under Arkansas statutes other than the Act here under attack. Also questionable is the legality of imposing a state *ad valorem* tax upon the value of an interstate motor carrier's operating authority issued by the Interstate Commerce Commission, as well as imposing the tax on current assets as the basis without credit for current liabilities.

Appellants respectfully submit that where this Court heretofore has approved the imposition of state *ad valorem* taxes upon the facilities of interstate transportation agencies, the taxing entity has been required to establish with reasonable certainty taxable situs within its jurisdiction of the taxed property and some reasonable basis between the amount of the tax and the benefits and privileges enjoyed by the taxpayer. *Ott v. Mississippi Valley Barge Co., supra.* Stated differently, there must be reasonable minimum contacts which will justify a finding that property is "present" within a state, physically or on an apportioned basis, before a state can levy an *ad valorem* tax thereon.

International Shoe Co. v. Washington, 326 U. S. 310; *Braniff Airways v. Nebraska, supra* (18 stops per day); *Pullman's Palace Car Co. v. Pennsylvania, supra* (an average of 100 coaches and cars in Pennsylvania all of the time); *Standard Oil Co. v. Peck, supra* (specific mileage in Ohio waters determined).

In the case at bar it is practically impossible to determine from the record how the Arkansas tax authorities could reach a determination that any specific or even representative property of the taxed appellants acquired taxable situs in Arkansas for any specific period or how the proportionate value of such property attributed thereto bore any reasonable relationship to the value of Appellants' use of Arkansas highways in the performance of interstate transportation. While it is true that this Court heretofore has upheld the constitutionality of state *ad valorem* taxes imposed under reasonable proportionate formulae upon the transportation facilities of interstate carriers by rail, water and air, extension of such legal concept to state *ad valorem* taxation of interstate motor carriers' facilities under circumstances such as those here disclosed is without discernible precedent. Certainly, extension of this legal concept in such an important area of commerce between the states will require something more than automatic application by mere analogy.

Appellants respectfully submit that a substantial federal question of first impression is here involved and that the Appeal should be entertained.

Respectfully submitted,

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PROOF OF SERVICE

I, George S. Dixon, one of the Attorneys for all named Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of April, 1961, I served a copy of the foregoing brief opposing reply to jurisdictional statement upon Bruce T. Bullion, Esq., Union Life Building, Little Rock, Arkansas, Counsel of Record for the Appellee, by United States Mail, air mail, postage prepaid.

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